STATE OF MICHIGAN

COURT OF APPEALS

C&S ELECTRIC SERVICE, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

ACEMCO, INC., d/b/a ACEMCO AUTOMOTIVE,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
July 15, 2010

No. 289094
Ottawa Circuit Court
LC No. 05-052436-CK

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

This action stems from the catastrophic failure of an electrical conduit system installed by plaintiff in defendant's plant, where approximately 260 feet of 1,000-amp electrical conduit fell approximately 35 feet onto the production floor. Plaintiff appeals as of right the judgment of no cause of action on all of plaintiff's claims and partial judgment in favor of defendant as to defendant's counterclaims. We affirm.

Plaintiff first argues that the trial court erroneously denied its motion for a directed verdict on defendant's counterclaims. Plaintiff contends that those claims were barred by the Uniform Commercial Code's (UCC) statute of limitations regarding sale of goods, as well as by the economic loss doctrine. Although plaintiff characterized its motion as one for a directed verdict, because it was brought in a bench trial, the motion is properly labeled as one for involuntary dismissal. MCR 2.504(B)(2); *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 235-236 n 2; 615 NW2d 241 (2000). We review a trial court's decision on a motion for involuntary dismissal for clear error. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995).

Article 2 of the UCC, MCL 440.2101 *et seq.*, "governs the relationship between the parties involved in 'transactions in goods.'" *Neibarger v Universal Coops, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992). "An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued." MCL 440.2725(1). "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." MCL 440.2725(2). "However, an injury caused by a service does not arise out of a 'transaction in goods' and is not subject to the remedy provisions, including the statute of

limitations, contained in the UCC." *Farm Bureau Mut Ins Co v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003).

The economic loss doctrine is derived from the UCC. *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 376; 656 NW2d 858 (2002). "[W]here a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations." *Neibarger*, 439 Mich at 527-528. Any related tort claims are barred by the economic loss doctrine. *Id.* at 520. However, this Court has declined to apply the economic loss doctrine to claims emanating from a contract for services. *Quest Diagnostics, Inc*, 254 Mich App at 379.

Below, the trial court recognized that the parties' agreement was a mixed contract for the sale of goods and services. "When determining whether the UCC applies to a contract for the sale of goods and services, Michigan courts apply the predominate factor test." *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527; 538 NW2d 424 (1995). "The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . . ." *Neibarger*, 439 Mich at 534, quoting *Bonebrake v Cox*, 499 F2d 951, 960 (CA 8, 1974).

Plaintiff takes the position that the parties' agreement was solely a transaction in goods. However, this position is contrary to plaintiff's admissions, where it admitted that it agreed to construct and install "an electrical conduit support system, press, and electrical system." Plaintiff is bound by the admission of the truth of defendant's allegation. *Lichnovsky v Ziebart Int'l Corp*, 123 Mich App 605, 608; 332 NW2d 628 (1983).

Regardless, the record supports the trial court's finding that the electrical goods were merely incidental to the purpose of the contract. *Frommert v Bobson Constr Co*, 219 Mich App 735, 739; 558 NW2d 239 (1996). Plaintiff provided electrical construction, installation, maintenance, and repair services to companies in West Michigan. It entered into an agreement with defendant, where it agreed to construct and install "an electrical conduit support system, press, and electrical system." Plaintiff submitted an estimate for the design and installation of the electrical work, and defendant subsequently issued a purchase order. The electrical system consisted of goods, which were identified in the estimate and purchase order, but there is no detail regarding the specific components. It is undisputed, however, that defendant sought an electrical system with sufficient capacity for its presses and that defendant was not involved in any part of the installation. Under these circumstances, defendant was not contracting only to purchase the electrical goods, because the goods would have been of no value unless installed. *Id.* Accordingly, the trial court did not clearly err in finding that the predominant purpose of the parties' contract was for services with goods incidentally involved. Because neither the UCC's four-year statute of limitations nor the economic loss doctrine apply to a contract for services, *Farm Bureau Mut Ins Co*, 255 Mich App at 720; *Quest Diagnostics, Inc*, 254 Mich App at 379, we affirm the trial court's order denying plaintiff's motion for involuntary dismissal.

Plaintiff also argues that the trial court's decision to adopt the opinions of defendant's expert and to disregard the testimony of one of plaintiff's experts was against the great weight of the evidence. A great weight argument following a bench trial is reviewed under the clearly

erroneous standard. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652 n 14; 662 NW2d 424 (2003). Clear error occurs either where there is no evidence to support the finding or where there is evidence but we are left with a definite and firm conviction that a mistake was made. *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007).

Ultimately, we defer to the trial court in determining the credibility of the expert witnesses. MCR 2.613(C); *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). Even if there was disagreement among the experts in this case, the credibility determination remains within the province of the trial court. *Anglers of AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 148; 770 NW2d 359 (2009). We conclude that the trial court did not clearly err in adopting the opinions of defendant's expert regarding the negative impact on load capacity of the conduit suspension system. Defendant's expert actually visited defendant's plant and viewed the failed conduit system. His opinions and conclusions were based on his experience as a structural engineer. In coming to his conclusions, defendant's expert only made one assumption, which was that the strength of the steel was 33 ksi. Plaintiff's expert agreed that this assumption was not unreasonable. In addition, plaintiff's expert admitted that she could not say that the conditions she tested replicated the actual conditions at the time of the failure. Under these circumstances, we are not left with a firm and definite conviction that a mistake has been made. *Hill*, 276 Mich App at 310. Accordingly, we affirm the trial court's determination that the testimony of defendant's expert was more credible.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering